No. 218.

Brf. of Herring & Chaney

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES,
Plaintiff in Error.
vs,
COPPER QUEEN CONSOLIDATED MINING COMPANY,
Defendant in Error.
} No. 218.

WRIT OF ERROR FROM SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM HERRING and
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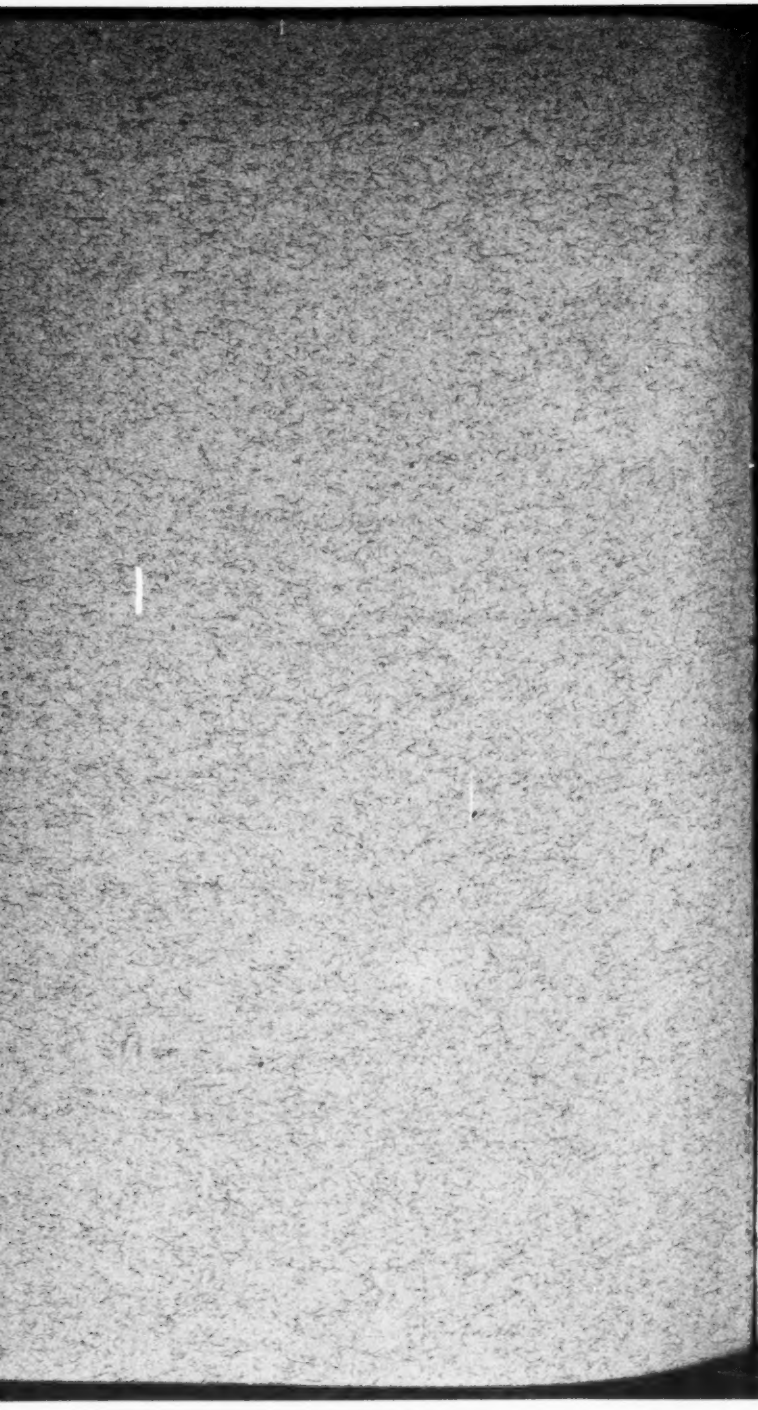

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Statement of the Case by Defendant in Error.

The history of the case presented by plaintiff in error, is erroneous in the following particulars, to-wit:

First: The issue presented by plaintiff in its complaint was that the timber in question was wrongfully cut, caused to be cut, removed, taken by, delivered to, used and consumed by defendant, COPPER QUEEN CONSOLIDATED MINING COMPANY; and it was upon

this theory that plaintiff conducted the trial of the case, and this issue was squarely presented for the determination of the jury and was only "practically settled beyond controversy," by its verdict.

The cutting and removal of the timber by the COPPER QUEEN CONSOLIDATED MINING COMPANY was a fact directly in issue to be determined by the jury. It cannot be assumed that the jury was precluded from deciding upon the evidence whether or not defendant, Copper Queen Consolidated Mining Company, itself cut the timber or caused it to be cut. It was one of the questions to be submitted to the jury from the evidence whether the defendant itself (through its agent) was primarily liable for the cutting, as charged in the complaint; or whether Ross himself cut or caused to be cut the timber.

Under the issues joined and the evidence in the case, if the jury found that the defendant, itself was directly responsible for cutting the timber, in accordance with plaintiff's theory of the case, the citizenship or the *bona fide* residence of any third person was entirely immaterial in determining defendant's liability for said cutting.

It cannot, therefore, be claimed, as stated by counsel for plaintiff in error (p. 1, brief for the United States) that, "the cutting and removing of the the timber by Ross was a matter settled beyond controversy," until the verdict of the jury was rendered.

Second: The statement in the "History of the Case" (p. 2, said brief) that:

"It appeared that defendant did not cut and remove any portion of the timber," is the assumption of a fact in issue in the case, which, under the pleadings and evidence in the case, was required to be submitted to the jury.

Third: The statement in the "History of the Case" (p. 3, said brief.)

> "And that it was purchased by the defendant company from him substantially as alleged by plaintiff, is at variance with the record. . The complaint does not sustain this statement (Trans. of Rec., 89)."

Again the following in the "History of the Case" (p. 3, said brief), is directly controverted by defendant in error.

> "No evidence was introduced having a tendency to show that said Ross was a citizen of the United States; nor was there any evidence tending to show that he was a *bona fide* resident of the Territory of Arizona; nor was there any evidence tending to show his residence at the time of the cutting and removal of such timber, except that contained in his deposition taken while he was still living, and a defendent on a former trial, and read in evidence upon this trial by reason of his decease."

On the contrary, while the record does not purport to contain *all the evidence* in the case, it sufficiently appears that Ross had the requsite qualifications to avail himself of the privilege of cutting and removing the timber in question under the Act of June 3rd, 1878. (20th St., L. U. S., 88.)

Evidence in the record, other than the deposition of Ross will be later set forth and referred to in the argument. Otherwise the statement of the case by plaintiff in Error is substantially correct.

Points and Authorities.

I.

The bill of Exceptions does not purport to contain all the evidence. This Court, therefore, cannot review the

action of the Trial Court in denying plaintiff's motion made at the close of the evidence, that the Court instruct the jury to find on the evidence adduced a verdict for the Government.

Texas & Pacific R Co. *vs.* Cox, 145 U. S., 593 to 608.
Russell *vs.* Ely, Second Black, 575.

II.

The Court properly refused to direct a verdict for plaintiff. The case should not have been withdrawn from the jury unless the conclusion followed, as a matter of law, that defendant was not entitled to verdict upon any view which could be properly taken of the facts which the evidence tended to establish.

Texas & Pacific R. Co. *vs.* Cox, 145 U. S., 593.
Gardner *vs.* Railroad Co., 150 Id. 349.
Dunlap *vs.* Northeastern R. Co., 130 Id. 649–652.
Kane *vs.* North Central Railroad Co., 128 Id. 91.
Jones *vs.* East Tenn., etc., R. Co., Id. 443.
Mo. K. & T. Ry. Co. *vs.* Hall, 87 Fed. 170.
Chicago G. W. Ry. Co. *vs.* Healy 86 Id. 244–249.

III.

A *bona fide* resident of the territory of Arizona is expressly authorized to cut timber on the public mineral lands, and it is immaterial whether the evidence discloses that such resident was also a citizen of the United States, or not.

Act of June 3rd, 1878, 20 St. L. U. S. 88.
United States *vs.* Smith, 11 Fed. 487, 8th Sawy. 101.
United States *vs.* Richmond, Min. Co., 40 Fed. 415.
United States *vs.* Eureka & P. R. Co., 40 Fed. 419.

IV.

Reference may be had to the proceedings of Congress to inform the Court as to the exigencies of the mining

interest and the reason for authorizing the cutting of timber on public mineral lands. These proceedings serve to indicate the probable intention of Congress in the passage of the Act.

Jennison *vs.* Kirk, 98 U. S. 453.
The Delaware, 161 U. S. 459.
Am. Net & Twine Co. *vs.* Worthington, 141 U. S. 468–474.

V.

A verdict on conflicting evidence will not be disturbed where there is some evidence to support it.

Parsons *vs.* Bedford, 3rd Peters, 433–447.
N. Y. C. & H. R. R. Co. *vs.* Fraloff, 10 Otto, 24.
Chicago, B. & Q. R. Co. *vs.* Chicago, 166 U. S. 226–246.
Aetna Life Insurance Co. *vs.* Ward, 140 U. S. 76.
Erie R. R. Co. *vs.* Winter, 143 Id. 60.
Carter *vs.* Ruddy, 166 Id. 491.

VI.

Upon writ of error to the Supreme Court of a Territory this Court will not review the action of the Trial Court in denying a motion for a new trial.

Sparrow *vs.* Strong, 4th Wall. 584–588.
Kerr *vs.* Clampitt, 5 Otto. 188–190.

And the final judgment cannot be examined through the rulings of the Trial Court upon that question.

Kerr *vs.* Clampitt, *supra.*

VII.

Error can not be predicated upon the opinion of the Court.

Columbus Safe Deposit Co. *vs.* Burke, 88 Fed. 630.
Evans *vs.* Suess Oram, Glass Co. 83 Fed. 706.
England *vs.* Gebhardt, 112 U. S. 502.

VIII.

Inferences of fact fall within the exclusive province of the jury.

Caffin *vs.* United States, 162 U. S. 664.

ARGUMENT.

The question presented by the writ of error in this case is greatly simplified by Counsel for the Government in discarding the useless propositions embraced in the several assignments of error presented upon which allowance of the writ of error was based. A closer investigation by counsel of the transcript of record in the case would probably have satisfied him that the last remaining prop upon which he relies to base an argument is without foundation. So far as the question presented is concerned, it is sufficient to call the attention of the Court to the material fact that, voluminous as is the bill of exception in the case, it does not purport to contain all the evidence. Russell *vs.* Ely, 2 Black, 575; Texas & Pac. R. Co., *vs.* Cox, 145 U. S., 593–608. The assignment of error relied upon by counsel for plaintiff in error therefore calls but for brief discussion. We concede that a motion to instruct the jury peremptorily, is not addressed to the discretion of the Court, but it presents a question of law which it is the duty of the Court to decide; and the ruling of the Court, in granting or refusing the motion, is as much the subject of exception by the party aggrieved as any other ruling of the Court in course of the trial. It is clearly settled, however, that such a motion should prevail only when there is a total failure on the part of the plaintiff to make out a case, or on the part of the defendant to establish a defense; and that it is not error to deny the motion where there is a conflict of evidence upon

any material issue. In other words, the established rule is that it is not error to deny such a motion, unless, it is clear that the facts established by the evidence, with every reasonable and proper intendment, are insufficient to warrant a verdict against the moving party. That the present case does not fall within the rule sought to be invoked by plaintiff in error is plainly demonstrable.

If the defendant had wholly failed to make out a defense, and, upon the evidence adduced, there was no question to submit to the jury, the proper time to move for a peremptory ruling or instruction for a verdict for the plaintiff was when the defendant rested. And, in view of the course which was adopted, and of the opinion expressed by the trial judge in overruling the motion for a new trial, that there was conflicting testimony, and the similar opinion expressed by the Supreme Court in affirming the judgment, we cannot believe that any reference whatever to the evidence is necessary in discussing the present proposition, under the assignments of error here relied upon by counsel for plaintiff in error.

At the trial, the Court construed the Act of June 3rd, 1878, precisely as counsel for plaintiff contended it should be construed, and in his charge to the jury they were told that their verdict must be for the plaintiff without regard to the mineral or non-mineral character of the land, unless the defendant established, by a preponderance of evidence, that Ross was a citizen of the United States, and a *bona fide* resident of the Territory of Arizona. In ruling on the motion for a new trial the learned Judge expressed doubts as to the correctness of his construction of the Act of June 3rd, 1878, at the trial; and it was in reviewing his ruling, overruling the motion for a new trial, that the construction now complained of was announced in the Supreme Court of the Territory.

But the question is a wholly immaterial one upon this record. We concede that there is no evidence in the Bill of Exceptions as to the *citizenship* of Ross. There is evidence, however, that he was a *bona fide resident* of Cochise County, Arizona, and of Rock Creek in said county; but the Bill of Exceptions does not purport to contain *all* the evidence; and in view of this fact, and of the further fact that when he submitted the question of Ross' citizenship to the jury, the learned Judge believed that it was incumbent upon the defendant to prove such citizenship by a preponderance of evidence, and so instructed the jury, the presumption is conclusive, in this court, that upon the trial of the case there must have been some evidence on the point. Had there been *no* evidence *whatever* on the point—not even "one word,"—as the seventh assignment of error alleges, the jury would, certainly, in the view which the Court then took of the law, have been instructed to return a verdict for the plaintiff. The verdict of the jury is conclusive, in this Court, therefore, that Ross was a citizen of the United States; and it appears to be useless to consider what the law of the case would have been had he not been a citizen. As the bill of exceptions does not purport to contain all of the evidence, the plaintiff in error cannot be heard to allege that there was no evidence on an issue expressly submitted by the trial judge to the consideration of the jury.

Russell *vs.* Ely, 2nd Black 575.
Texas & Pac. R. Co. *vs.* Cox, 145 U. S. 593–608.

Inasmuch, however, as it is contended, in the brief of the plaintiff in error, that Ross must be shown to be a citizen, and a *bona fide* resident, in order to justify the cutting alleged in the complaint, and as plaintiff in error contends that there was no evidence to prove either his

residence or citizenship, we direct the attention of the Court to the following:–

The complaint alleges that "defendant cut and caused to be cut the timber therein referred to." In the answer (par. II, p. 10 Tr. of Rec.) defendant expressly denies that "it cut or removed, or that it caused to be cut or removed, the said timber, or any part thereof."

One of the issues involved in the case is:–

Did the defendant cut and cause to be cut the timber referred to? There was some evidence to support the allegation of the complaint referred to, from which it might have been inferred that defendant itself (through its agent) was primarily responsible for the cutting, as charged in the complaint (Tr. of Rec., pp. 8, 19, 20, 21 and 22). As there was some evidence to support plaintiff's theory of the case, that defendant itself was directly responsible for the cutting of the timber, appellant cannot be heard to contend that it was entitled to a verdict, because, as it alleges, there was no evidence to support defendant's theory of the case.

No question is raised in the case as to the defendant's being qualified to cut under the provisions of the Act of June 3rd, 1878. The admission of plaintiff in the pleadings, and at the trial, and the evidence in the case conclusively show, that the defendant was qualified to avail itself of the privilege conferred by that statute (Tr. of Rec., p. 8, 25).

Section one, R. S. U. S. provides that the word person may extend and be applied to Corporations.

Plaintiff's contention that one must be both a citizen and a *bona fide* resident is utterly without foundation; but even if this be the law, the defendant Corporation, as shown by the pleadings and evidence referred to, possess-

ed both qualifications. (Sec. 23 and 25 R. S. U. S.) Decision relating to Public Lands, Dept. of Interior, Volume 22, p. 83, rule 76. Circular of Dec. 10, 1891. Decision relating to Public Lands, Vol. 22, pp. 1, 2 & 3.

Under the pleadings and evidence in the case there was an issue as to whether Ross or the defendant cut and caused to be cut and removed the timber referred to in the complaint. There is direct and positive evidence showing that Ross was a *bona fide* resident of Arizona at the time the timber was cut. It is alleged within the complaint and expressly admitted in the answer that Rock Creek is in Cochise County in the Territory of Arizona. Daniel D. Ross, (now deceased, but whose testimony given at the former trial of this action was given in evidence) testified that he "*moved* into Rock Creek and commenced cutting timber therein in April, 1887;" that he quit cutting there in August, 1893 (Tr. of Rec., pp. 96, 97, 98, 99).

To "move into" a place is to change ones residence to that place. Move, act of changing residence; Webster Dict., Century Dict. Ross changed his residence to Rock Creek, in April, 1887. No evidence was offered at the trial to show that said residence was subsequently discontinued or interrupted, it must therefore, be presumed that his residence continued to be in Rock Creek where it is proved to have been in 1887. Mitchell *vs.* United States, 21 Wall., 350. Jones on Ev., Secs. 52 and 54. 19 American and English Encyc. of Law, p. 76, note one. 21 Id. 125 note; Whitford *vs.* Clark Co., 119 U. S., 522. The testimony of Ross shows that he resided in Rock Creek, and was engaged in cutting timber there from 1887 to 1893. His testimony shows that he cut down a good many trees himself. That he moved hay into Rock Creek for his animals; that he dug a well. The evidence also

discloses the fact of his establishing one mill setting in Rock Creek, and he established a second mill setting in Rock Creek. (Tr. of Rec., pp. 98–99.)

The testimony of Ross shows that he proceeded in good faith to comply with the requirements of the law relative to the cutting of timber upon public mineral lands. This is the only evidence needed to show good faith in cases of this character. No presumption of fraud arises when one seeks to avail himself of a privilege conferred by law. The *weight* and *credibility* of Ross' evidence was a question for the jury. As we have already said, however, in view of the condition of the record, it is entirely immaterial whether the evidence in the record discloses that Ross was also a citizen of the United States, or not. But it may be proper here to further discuss the proposition presented by plaintiff in error in relation to the citizenship of Ross. The act of June 3rd, 1878, in express terms provides that :

"All citizens of the United States and other persons, *bona fide* residents of the States, Territories and Districts therein mentioned, are authorized to fell and remove any timber or other trees on public mineral lands, in either of said States, Territories or Districts of which such citizens or persons may be at the time *bona fide* residents." The language of the act itself is a sufficient reply to the contention of the plaintiff in error that Ross must be shown to be *both* a citizen and a *bona fide* resident.

In a case decided soon after the Act of June 3rd, 1878, was passed, Judge Deady, in construing this statute, uses the following language :

"This Act contains three sections. The first one authorizes any *bona fide* resident of the States or Territories aforesaid," naming them "and all other mineral districts of

the United States" to fell and remove, for building, agriculture, mining or other purposes, "any trees growing upon the public lands, said lands being mineral, and not then subject to entry except for mineral entry," etc. United States *vs.* Smith, 11 Fed., 487. See also United States *vs.* Eureka & P. R. Co., 40 Fed., 419. United States *vs.* Richmond Mining Company. 40 Fed., 415.

In Northern Pacific Railroad Company *vs.* Lewis, 162 U. S., 363, it appears, from the statement of the case, that the plaintiffs were citizens of the United States and and residents of Montana. The language, in the opinion of the Court, cannot possibly be construed to mean that a person who was a resident, and not a citizen, could not cut timber on mineral lands. No such point was involved in the case; and in the case of the United States *vs.* Lynde, 47 Fed., 297, it appears that Lynde was both a citizen of the United States and a *bona fide* resident of Montana. In no case is it held that any one who cuts timber on the mineral lands must be both a citizen of the United States and a resident of one of the States or Territories named in the Act of June 3rd, 1878, or that *bona fide* residence is not a sufficient qualification for one to avail himself of the privileges conferred by that Act.

Further referring to the statement of counsel for plaintiff in error that "no evidence was introduced having a tendency to show that Ross was a citizen of the United States; nor was there any evidence tending to show that he was a *bona fide* resident of the Territory of Arizona." We direct the attention of the Court to the testimony of Ben Williams, a witness called by the Government who says:

"I knew a man by the name of Daniel D. Ross, I first became acquainted with him about '83, or '84, (p. 20, Trans. of Rec.). Upon being asked the question "Well

about the year 1890, then did you have any business transaction with Ross with reference to the purchase of timber?" The witness answers, "I think twice or three times I had purchased timber for the Company of Mr. Ross (Tr. of Rec., pp. 20 and 21)". "The first purchase of timber or lumber from Ross was in the Fall of 1885. I knew at the time that the contract was made, and during the delivery of the timber the timber was coming from the Chiricahua Mountains, from Rock Creek and vicinity. The commencement of the delivery was in 1885, and the last delivery in 1893" (Tr. of Rec., p. 22).

Here there is the evidence of a witness who knew Ross while he was cutting timber in the Chiricahua Mountains and in Rock Creek, from 1883 or 4 to 1893, a period of about 10 years. Rock Creek and the Chiricahua Mountains are situated in Cochise County, Territory of Arizona (Tr. of Rec., pp. 8 and 95).

The testimony of Charles W. Smith, another witness for the Government is as follows:–

"Went to live in Rock Creek in the Winter of 1888 or 1889. Staid there four years, or a little over, in that vicinity. When I first went there, worked for Mr. Ross. Afterwards I worked for myself, driving my own team. When I was driving my own team I was hauling lumber for Mr. Ross. I hauled out of Rock Creek (Tr. of Rec., p. 215)".

The Congressional Records shed considerable light upon the intent and purpose of the Act of June Third, 1878.

This Act, known as "Senate Bill No. 20", was introduced in the Senate at the Second Session of the 45th Congress.

The bill passed the Senate and went to the House of Representatives, where it was referred to the Committee on Public Lands in the House of Representatives. On May 9, 1878, a favorable report was made by that committee to the House. That report proceeds as follows:–

45TH CONGRESS,
2ND SESSION.

Senate Bill 20.

REPT. 122.

"The Committee have carefully considered the subject of timber and timber lands, and after mature deliberation, with a view of devising the best methods of preserving, cultivating and disposing of the same, have come to the conclusion that a distinction should be made between such trees as grow upon the mountain in the mineral districts, and the forests of pine, oak and other timber that grow in the more level portions of the country.

While the lumber of the latter is a regular and important article of commerce and is constantly being cut and transported in large quantities to ready markets, the character of the former renders the timber unfit for commercial purposes. Even were this otherwise, it is usually found in such inaccessible places as to preclude its transportation to market. Consequently it is used by the prospector, the miner or other members of mining communities for domestic and other practical purposes incidental to the development of mineral districts.

The committee do not believe that it would be wise policy on the part of the Government to seek to profit directly by the sale of this kind of timber nor to tax the pioneer by compelling him to purchase it.

Except as a source of revenue, by sale to the settler, it never can be of any value to the Government.

Should the experiment be tried of requiring pay for it, it would be found that the cost of keeping agents for its sale, and officers to prevent or punish infractions of the law at remote and widely separated settlements, would largely consume all sums received for this timber by the Government.

Thus while it is practically of but little value to the Government it is essential to the settler, and indispensible to his occupation and development of the mineral lands.

It has been the custom of Congress to encourage the exploration and development of the mineral regions of the United States; and in this connection, it should be born in mind that it is mainly to the indomitable energy, hardihood and daring of the pioneer that we are indebted for the discovery and development of gold and silver districts of the country. What would this country be today had it not been for our product of gold and silver during the last quarter of a century? The $100,000,000 annually added by the United States to the world's stock of bullion will amply pay for the use of the scattering timber found in those localities. Instead of imposing this timber as a tax upon this important branch of industry, the Committee are of the opinion that under the restrictions provided in this bill, and on the grounds of equity and public policy, the Government should allow its free use by the actual settler for the purposes alluded to herein."

In 1866, Congress, by express statute authorized the occupation and use of these mineral lands as follows:

"Be it enacted, etc.:

That the mineral lands of the public domain both surveyed and unsurveyed, are hereby declared

to be free and open to exploration and occupation by all citizens of the United States and those who have declared their intention to become citizens, subject to such regulation as may be prescribed by law, and subject also to the local customs, and rules of miners in the several mining districts, so far as the same may not conflict with the laws of the United States."

This is an express grant by the Government to the people who occupy this portion of the public domain. There may be no law by which settlers could purchase either the timber necessary for occupation, or the land upon which that timber is found.

It is a well settled principle applied to grants that the grant carries with it all the incidents necessary to enable the grantee to render the grant available.

It is absolutely necessary for settlers to have timber for domestic use in order to enable them to occupy these mineral lands. It would be a mockery to make this grant without including such use of timber.

It cannot be said that it was ever intended the occupants should pay for this timber, since no provision has ever been made for its sale or purchase.

The Government is more than paid for its value by the increased wealth added by mining operations to the grand total of taxable property.

In view of these considerations the committee recommend the passage of the substitute, which contains limitations and guards for the protection of undergrowth and such other restrictions as seem just and equitable."

7 Cong. Rec., 45., 2d Sess., pt. 4, p. 3327, *et seq.*

United States *vs.* Eureka & P. R. Co., 40 Fed. 419.

Reference may be had to the proceedings of Congress to inform the Court as to the exigencies of the mining interests and the reasons for authorizing the cutting of

timber on public mineral lands. These proceedings serve to indicate the probable intention of Congress in the passage of the Act.

Jennison *vs.* Kirk, 98 U. S. 453.

For recent cases in which the Supreme Court of the United States has referred to the report of a Congressional Committee, for a similar purpose, see:–

The Delaware, 161 U. S. 459.
Am. Net and Twine Co. *vs.* Worthington, 141 Id. 486, 474.

Extracts from the Journals of the Senate or of the House of Representatives, certified by the Secretary of the Senate, or by the Clerk of the House of Representatives, are admitted as evidence in the Courts of the United States, and have the same force and effect as the originals would have if produced and authenticated in court.

Sec. 895, R. S. U. S.
Jones on Ev., Sec. 519.

This report confirms the construction placed upon this Act by these cases:–

United States *vs.* Richmond Min. Co., 40 Fed., 415,
United States *vs.* Edwards, 38 Id., 812.

The cases cited by government counsel on citizenship and residence are inapplicable to the case at bar because:

1. The evidence in the record proves both the citizenship and residence of the Copper Queen Consolidated Mining Company, which is charged with the cutting of the timber.

2. In the absence of proof that the record contains all the evidence, it must be presumed that it was proven to the satisfaction of the jury, that Daniel D. Ross was a

bona fide resident of Rock Creek, Cochise County, Arizona, at the time this timber was cut.

It is proper to show to this court that the motion stated by plantiff in error, in the assignment of errors, in the record, to wit: "That the court instruct the jury to find on the evidence adduced a verdict for the government," (Tr. of Rec., p. 322) is not the motion which was made by the plaintiff in the action at the close of the trial. That motion, as shown by the minute entry in the record, was as follows: "Counsel for plaintiff moved the court to instruct the jury to find for the plaintiff, that defendant has failed to establish any authority or license to cut timber under the act of Congress in that behalf." (Tr. of Rec., p. 283). It appears that the defendant before the court, charged with the cutting of the timber, was the Copper Queen Consolidated Mining Company. (Tr. of Rec., p. 8). In its third amended complaint, plaintiff had alleged that "defendant, the Copper Queen Consolidated Mining Company, is a corporation organized and existing under and by virtue of the laws of the state of New York, and doing business in the county of Cochise, Territory of Arizona." (Tr. of Rec., p. 8).

Proof of the filing of a certified copy of the articles of the Copper Queen Consolidated Mining Company and of the due appointment of a corporate agent, are found in the record. (Tr. of Rec. pp. 25, 307 to 309 inclusive). This was done to show that the Copper Queen Consolidated Mining Company possessed the qualifications of citizenship, and *bona fide* residence beyond any question. It thus appears that so far as the defendant's liability was to be considered by the jury, its citizenship and *bona fide* residence had been established beyond question. To quote the language of the court in overruling plaintiff's motion for a new trial, "there was ample evidence

to satisfy the jury in concluding that the Copper Queen Company was a person entitled to cut and remove the timber, and that it was used for the purposes mentioned in the act." (Tr. of Rec., p. 263).

The language incorporated in the assignment of error in question, is found in the (Tr. of Rec., p. 246), and it there appears that the court immediately decided the motion, but a reference to the minute order (p. 282, 283 Tr. of Rec.), shows that when the evidence in the case closed, the court took a recess until 2 p. m., and that then at the request of counsel for plaintiff that they desired to submit a motion in the absence of the jury, the jury was excused until the following morning, whereupon counsel for plaintiff made the motion as set forth in the minute entry. (p. 283, Tr. of Rec.).

It is suggested that the criticism of Counsel for plaintiff in error, in view of this imperfect record, that "the Court contributed directly to the error of the jury arrived at in their verdict," is not entitled to serious consideration.

Neither is it worth while to discuss the alleged failure of Ross in his deposition to state explicitly in relation to his residence when it is considered that the complaint of plaintiff at the very trial, at which the evidence was taken which is incorporated in said deposition specifically alleged the residence of Ross to be in Cochise County, Arizona. That this was the requirement of the statutes of Arizona at the time of said trial it is presumed this Court will take cognizance. (R. S., Arizona Pleadings.)

Counsel for plaintiff in error concedes that the issue here is narrowed down to one proposition as to the alleged error of the Courts of Arizona.

1st. "In declining to instruct the jury to find for the plaintiff, and later in holding that it was unnecessary to show that Ross, the party who cut and removed the

timber, was a citizen of the United States," or "that, there was no evidence sufficient to be submitted to the jury that he was a *bona fide* resident of the Territory of Arizona. Counsel for plaintiff in error states that "this issue was carefully raised throughout the progress of the case and this Court is asked to pass upon the action of the lower Courts and to construe the hereinbefore quoted section of the Act in question" and then counsel for plaintiff in error proceeds to say (page 6 plaintiffs brief in error.) "As all the testimony of the case is here in the transcript of record it is easy to find", and then the counsel proceeds to state (p. 6 brief for U. S.) that he does not find anywhere in the record that Ross was such citizen, except it may be inferred from the general verdict for defendant, and again (p. 7 of said brief) counsel quotes the instructions given by the trial Court (found in Tr. of Rec. p. 249) and proceeds "but it may be seen at a glance that the refusal of the Court to instruct the jury for the plaintiff and the giving of the instructions as above quoted was equivalent to an assumption upon the part of the Court that there was evidence upon this important question which it was his duty to submit to them with such instructions." (p. 7 brief for the U. S.)

Let us say *again* that :

The transcript of record does not purport to contain all the evidence in the case The conclusion reached by counsel for plaintiff in error after considering the language of the Court contained in the instructions which he quotes was undoubtedly the conclusion which the Trial Court had reached when the motion to direct a verdict was presented, namely, that there was evidence upon this important question which it was his duty to submit to the jury with the instruction quoted. In the absence of

any proof that the record contains all the evidence in the case, this Court, in passing upon the assignment of error in question is bound to presume that there was sufficient evidence before the Court upon the question of citizenship and *bona fide* residence of Ross to justify the Court in submitting that issue to the jury; and we respectfully insist that the evidence *does prove* the *bona fide* residence in Arizona of both Ross and the defendant at the time the timber in question was cut.

We submit that the judgment of the Court below should be affirmed.

WILLIAM HERRING and
JOHN C. CHANEY,
Attorneys for Defendant in Error.

February 20, 1902.